"ORIGINAL"

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK (E.D.N.Y.)

CIVIL #_____

WEINSTEIN, J.
LEVY, M.J.

BRIEF IN SUPPORT OF APPLICATION FOR HABEAS CORPUS RELIEF PURSUANT TO 28 U.S.C. §2241(a) AND REQUEST FOR CLASS CERTIFICATION PURSUANT TO RULE 23(b)(1) AND RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE PURSUANT TO RULE 23(c)(1) & 23(c)(3)

MICHAEL SOLOMON, ET. AL.; VS. MICHAEL A. ZENK, WARDEN, ET. AL.;

Petitioner(s) Defendant(s)

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STATEMENT OF FACTS

On or before December 24, 2002, the Bureau of Prisons faxed a letter to all federal Judges announcing that designation of offenders to Community Confinement were forbidden as a matter of law, and that such policy of practicing and adopting judicial recommendations to place nonviolent inmates in such facilities and to place inmates transferring from prison to Community Confinement for the 'last six months of their sentence' would be abandoned. The author of this new practice being followed was the Department of Justice Office of Legal Counsel to the United States Deputy Attorney General, who on December 13, 2002, issued an opinion outlining why the old policy would no longer be followed.

As a result of that action the petitioner(s) and all similar situated class members have been denied the opportunity to fully participate in the Community Corrections Program, because the Bureau of Prison has erroneously applied the application of 18 U.S.C. §3621(b). The Bureau of Prisons has taken the position that the petitioner(s) named in this action and all similar situated class members are only entitled to 10% percent of the total term imposed by the Court as regards Community Correction Center placement. This erroneous interpretation has caused petitioner(s) due process rights to be violated, and has further violated the Administrative Procedure Act (APA), which renders such "reinterpretation invalid".

All named petitioner(s) did exhaust Administrative Remedies in this matter, notwithstanding that such is not required under 28 U.S.C.A. §2241. Petitioner(s) were denied all relief by the Warden on _____,2004.

The petitioner(s) now move for relief before this Court.

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LEGAL ARGUMENTS:

LEGAL ARGUMENT

(A) VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT'S (APA) NOTICE AND COMMENT PROCEDURAL PREREQUISITES RENDERS THE BUREAU OF PRISONS ADOPTION OF SUCH "NEW RULE" INVALID AND UNENFORCEABLE BY LAW, BECAUSE SUCH VIOLATES THE DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION AND 5 U.S.C. §§ 551 et seq.

The facts are not in dispute. The Bureau of Prisons adopted its "new rule" regarding Community Confinement without engaging in the rigorous "notice and comment" procedures set forth in the A.P.A., 5 U.S.C. § 553. It is equally indisputable that, unless an agency rule is of a type excepted from th A.P.A., violation of these procedural prerequisites renders it invalid. See - Aver v. Robbins, 117 S.Ct. 905, 137 L.Ed 2d 79 (1997); Ferguson v. Ashcroft, 248 F. Supp. 2d 564-65 (2003); Iacobni v. United States, 251 F. Supp. 2d 1015 (D. Mass. 2003); Mallory v. United States, 2003 WL 1563764 (D. Mass. March 25, 2003).

The A.P.A. broadly defines "Rule" to include "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C § 551(4). Defendant(s) "new rule" is not exempt from notice and comment procedures under 5 U.S.C. § 553(b)(3)(B). The facts clearly show that this "new rule" is a substantive (or legislative rule) because such was issued by an agency pursuant to statutory authority, and which implement the statute .... such rules have the force and effect of law. See - Charles H. Koch, Jr. 1 Admin. L. & Prac. § 4.11 (2d ed. 2003) ("[L]egislative rules are binding on courts as an extension of legislative power"). It is submitted that the new policy places sweeping limitations on the BOP's discretion and such limitations have binding legal effect on both BOP personnel and third parties (Judges and Inmates) alike.

A "rule with the force and effect of law that is binding not only

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on the agency and regulated parties, but also on the Court - is by definition a substantive rule". See - Warder v. Shalala, 149 F.3d 73 (at 82) (1st Cir. 1998). In determining whether a rule carries the "force of law", the "critical factor" is "whether it leaves the agency officials free to exercise discretion in any individual case" or instead requires a uniform, predetermined outcome that admits of no exception.

The law supports the facts. The BOP has illegally revisited the statutory provision of 18 U.S.C. §3624(c) and §3621 and attempted to reshape such statutory provision through an administrative statement of lawmaking. Our Court spoke to the issue in Mallory v. United State, 2003 WL 1563764 (D. Mass. March 25, 2003), by stating in part:

> "application of a general legislative rule is involved in the attempted redesignation of defendants from community confinement to secure facilities. This is no mere effort at interpretive guidance but rather a rule-making exercise designed to reshape the scope of a statutory provision" ... (omitted in part) Mallory, 2003 WL at *2;

Irrespective of the BOP's characterization of its policy, the new policy has the force of law and is not merely interpretive ... the new policy is not flexible and does not permit BOP to exercise any discretion. See Martin v. Gerlinski, 133 F.3d 1076 (8th. Cir. 1998) (holding that a BOP definition on "nonviolent offense" was legislative because it did not merely explain statutory meaning but "expanded" the reach of a regulation to bar offenders from early release).

The new rule is a sustantive (or legislative rule) because such "new rule" affords parties no opportunity for meaningful input and simultaneously insists that that the rule admits of no exception and is legally binding on the BOP, defendants, and Judges.

Petitioner(s) ask that the court find that the "new rule" is invalid and unenforceable because it violates the Administrative Proc-

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edure Act's Notice and Comment Procedural Prerequisites as set forth in 5 U.S.C. § 553 and further violates the Due Process Clause to the United States Constitution.

LEGAL ARGUMENT

(B) THE EX POST FACTO CLAUSE FORBIDS RETROACTIVE APPLICATION OF THE BUREAU OF PRISONS POLICY CHANGE TO PRISONERS WHOSE OFFENSE CONDUCT PREDATED THE CHANGE BASED ON PROTECTIONS UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Section 9 of Article I of the United States Constitution, which enumerates the powers of Congress, provides that "no Bill of Attainder of ex post facto law shall be passed". The Supreme Court has long held that an ex post facto law is one that "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts". Cal. Dept of Corrections v. Morales, 131 L.Ed. 2d 588 (1995) (citing, inter alia, Calder v. Bull, 3 U.S. (3 Dall.) 386, 391. 1 L.Ed. 648 (1798). To succeed, an ex post facto challenge must show that the law in question "applies to conduct completed before its enactment" and that "it raises the penalty from whatever the law provided when he acted." See - Johnson v. United States, 146 L.Ed. 2d 727 (2000).

Petitioner(s) submit that they are suffering an increase in their punishment which is punitive because the prgression from a sentence with eligibility for possible community confinement to one without the remotest possibility of such eligibility constitutes a significant increase in the measure of punishment for the offenses they pled guilty to. The Ex Post Facto Clause not only forbids retroactive gestures that make quantitative adjustments to criminal penalties, but also rejects retroactive application of laws mandating certain actions on prisoners. See - In Re Medley, 33 L.Ed. 835 (1890). Morales, supra., is explained and distinguished from this matter. Here there is no speculation, con-

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jecture, or attenuated chain of cause and effect in this matter. Here the conclusion is easily reached, that the Department of Justice's clampdown on BOP discretion as to place of imprisonment and as to when such can be effectuated increases punsihment for prisoners. See - Iacaboni, 251 F. Supp. 2d at 1041 (observing that the BOP's policy change presents a situation "entirely different" from that in Morales - the risk of increased punishment is not at all speculative"). The BOP had a clear and consistent policy of accepting and considering judicial recommendations at the outset of the sentence and releasing prisoners into such facilities six months before the end of their terms. See - Ashkenazi, 246 F.Supp. 2d at 7. The elimination of that eligibility or consideration for eligibility to such Community Correction Center once such policy had been established notwithstanding that it came with no gurantee - was sufficient to offend ex post facto principles. This case is identical to Lynce v. Mathis, 137 L.Ed. 2d 63 (1997), where the Supreme Court found that the retroactive cancellation of early time credits violated the Ex Post Facto Clause. The Court said that: "The fact that a prisoner was not necessarily entitled to the credits when he pleaded guilty made no difference to the Court. The new policy "made ineligible for early release a class of prisoners who were previously eligible". Id at 446, 117 S.Ct. 891. Although, a prisoner cannot level a due process challenge to the BOP policy reversal on the ground that he was unlawfully deprived of a liberty interest in Community Confinement, the law does recognize a due process right not to be sentenced on false information. Roberts v. United States , 65 L. Ed. 2d 622 (1980); United States v. Tucker, 30 L.Ed 2d 592 (1972); also United States v. Montoya, 967 F.2d 1, 2 (1st. Cir. 1992) (recognizing that the accuracy of information before the sentencing judge bears on the "fundamental fairness" of the proceeding); United States v. Rone, 743 F.2d 1169, 1171 (7th Cir. 1984) ("Convicted defendants, including

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those who plead guilty, have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information.") At least eight Courts have found in published decisions this doctrine to be appropriate to apply in the present situation, where a trial Court sentenced with the understanding - and often with express assurance from BOP representatives - that a prisoner would be eligible for community confinement at some point prior to the last (10) percent of his term. See - Iacaboni, 251 F. Supp. 2d at 1020-21 (finding that the BOP's sloughing of its discretion violated due process in sentencing); Cutler, 241 F. Supp. 2d at 25-26 (citing Dewitt v. Ventetoulo, 6 F.3d 32, 35 (1st Cir. 1993). Other Courts have upheld due process challenges. See, Pearson, 265 F. Supp. 2d at 979-83; Tipton, 262 F. Supp. 2d at 637; Byrd, 252 F. Supp. 2d at 303; West, 2003 WL 1119990, at *4. Petitioner(s) now submit that Due Process principles provide an independent ground to challenge the BOP's policy reversal for those prisoners whose sentences took the existing policy into account. The time triggers of Ex Post facto and Due Process Clause protection differ in this context. The Ex Post Facto Clause protects a prisoner from changes in the law that occur after he commits the crime. The BOP policy change offends due process principles insofar as the altered conditions of a prisoner's sentence were not known to the sentencing Court. Where a defendant's offense conduct predated the policy change but his plea and sentencing occurred after the change, only ex post facto principles bar retroactive application of the BOP policy. Thus due process concerns are implicated in this matter.

LEGAL ARGUMENT

(C) BUREAU OF PRISONS REINTERPRETATION OF 18 U.S.C. §3624(c) LIMITING EACH PRISONERS COMMUNITY CORRECTION CENTER PLACEMENT TO TEN PERCENT OF THE TERM IMPOSED BY THE SENTENCING COURT IS AN INCORRECT INTERPRETATION OF THE LAW, AND VIOLATION OF THE DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION.

Statute, 18 U.S.C. §3624(c), outlines what steps the BOP is required to take at the end of an imprisonment term to ease a prisoner back into society - and when it must take them. Section §3624(c) provides as follows:

> "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement."

18 U.S.C. §3624(c), supports the fact that imprisonment means being in the custody of the Bureau of Prisons, rather than in any specific locale. It includes home confinement - a condition substantially less coercive than community confinement. Among the array of measures that the Bureau of Prisons may take in discharging its duty to help transition prisoners back into society at the end of their terms. The Bureau of Prisons now alleges that it can no longer follow the statute because its past reliance on such was an erroneous interpretation of how such statute should be enforced or applied to prisoner's. The Bureau of Prisons decision is in direct contradiction of the principles of statutory construction, and existing case law. A court is not supposed to consult legislative history where, as here, the meaning of a statute is clear from its plain language. See - United States v. Charles George Trucking Co., 823 F.2d 685, 688-89 (1st. Cir. 1987) ("In the case before us, the

statutory command is clear as a bell - and its melody is unmuffled by any discordant legislative undertone.") (Citing United States v. Turkette, 68 L.Ed. 2d 246 (1981). The plain language of §3624(c) places no curbs on Bureau of Prisons discretion as to place of confinement prior to the last six months or 10% percent of confinement. The provision's purpose is not to set strict conditions on when the Bureau of Prisons can designate a prisoner to community confinement. The statute in fact burdens the Bureau of Prisons with a duty (albiet a "qualified" one). Prows v. Federal Bureau of Prisons, 981 F.2d 466, 469 (10th Cir. 1992); Howard, 248 F. Supp. 2d. at 544; Ferguson v. Ashcroft, 248 F. Supp. 2d at 572. It "shall" take steps to "assure" that prisoners serve the last 10 percent of their prison terms under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community". What one statute, §3624(c), requires and another §3621(b), allows the Bureau of Prisons to do are two separate matters. It is illogical and inappropriate to infer that where the mandate that §3624(c) places upon the Bureau of Prisons at the end of a prisoner's sentence stops, a limitation on its discretion for the period before that begins. Three of our Circuit Court Judges (2nd Circuit) Southern District of New York have issued opinions which conform with the most recent caselaw out of other District Courts in other Circuits. On October 30, 2003, the Hon: Kimba Wood announced in Greenfield v. Menifee, No.03-CV-8205 (KMW), that the Bureau of Prisons should reconsider the petitioner's halfway house placement "in good faith". This required the Bureau of Prisons, specifically, the Warden at FPC Otisville (N.Y.) to undertake a fesh and open-minded review consistent with its past practices. On February 3, 2004, the Bureau of Prisons announced that it was sending "Greenfield" to a halfway house for more than his ten percent

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date of (60 days). In fact, "Greenfield" received double that amount of time as alleged was allowed under the "new rule". In the second, case which was announced on the same date as Judge Woods decision, Judge Richard Holwell announced his agreement with statutory arguments advanced by FPC Otisville inmate Abraham Zucker challenging the Bureau of Prison's halfway house placement eligibility rules. See - Zucker v. Menifee, 2004 WL 102779 (SDNY). The other favorable decision in the Southern District of New York is Cato v. Menifee, 2003 WL 22725-524 (SDNY 2003) (Chin, J.)

Numerous courts across the Country have found the new Bureau of Prisons policy to be legally invalid on a variety of grounds. See - Iacaboni v. United States, 251 F. Supp. 2d 1015 (D. Mass. 2003) (Ponser, J.); Pearson v. United States, 265 F. Supp. 2d. 973 (E.D. Wis. 2003); Tipton v. Federal Bureau of Prisons, 262 F. Supp. 2d. 633 (D. MD. 2003); Byrd v. Moore, 252 F. Supp. 2d. 293 (W.D.N.C. 2003); United States v. Serpa, 251 F. Supp. 2d 988 (D. Mass. 2003) (Young, CJ); Ferguson v. Ashcroft, 248 F. Supp. 2d. 547 (M.D. La. 2003); Howard v. Ashcroft, 248 F. Supp. 2d 518 (M.D. La. 2003); Ashkenazi v. Attorney General, 246 F. Supp. 2d 1 (D.D.C. 2003); United States v. Tkabladze, No. CV-03-01152, CR 02-00434(A) (CD. Cal. May 16, 2003) (slip op.); Mallory v. United States, 2003 WL 1563764 (D. Mass. Mar. 25, 2003); (Woodlock, J.); United States v. West, 2003 WL 1119990 (E.D. Mich. Feb. 20, 2003); McDonald v. Federal Bureau of Prisons, No. 03-CV-235 (N.D. Ga. Feb. 14, 2003); United States v. Canavan, 2003 WL 245226 (D. Minn. Jan. 22, 2003). The Iacaboni Court stated that the "well established practice of the Bureau of Prisons of placing certain offenders in community confinement to serve some or all of their terms of imprisonment "was not and is not, even remotely unlawful". 251 F. Supp. 2d at 1017-18. Second, the Bureau of Prison's manner of adopting this funda-

mental change, even assuming it had substantial merit, was improper under the Administrative Procedure Act. Id at 1018. Thrid, the retroactive application of this policy violates the Constitution. See id. Offender Classification and assignment decisions made pursuant to this policy are therefore invalid, and the Bureau of Prisons retains the discretion to employ community confinement as it always did prior to December of 2002. All that §3624(c) suggests is that whatever the conditions of confinement were prior to the last 10 percent of a prisoner's term (not to exceed six months), the remaining period is to be served under pre-release conditions.

Petitioner(s) have proven that in all three categories (1) Individuals who pleaded guilty or were convicted prior to the new BOP policy; (2) Individuals who pleaded guilty or were convicted prior to the new policy, but were sentenced afterward; and (3) Individuals comprised of inmates approaching the end of their imprisonment terms who had been designated for a community confinement facility, pursuant to longstanding BOP policy, only to have their designation abruptly changed, have all fulfilled the legal prerequisites necessary to make them parties to this Class Action. Petitioner(s) now ask that the Court find that their right under the Due Process and Ex Post Facto Clause has been violated by the defendant(s) sudden and unexpected actions in issuing a "new Policy" without proper authority under the law to do so.

LEGAL ARGUMENT

(D) BUREAU OF PRISONS "NEW POLICY" AND REINTERPRETATION OF FEDERAL STATUTE 18 U.S.C. §3621, LIMITING THE BUREAU OF PRISONS DISCRETION TO PLACE OFFENDERS WHEREVER IT DEEMS APPROPRITAE IS UNCONSTITUTIONAL AND UNLAWFUL IN VIOLATION OF THE CONSTITUTION UNDER DUE PROCESS CLAUSE AND EX POST FACTO LAWS.

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18 U.S.C. §3621(b) does not support the government's position at all. The government bases its sudden change to the "new" policy on its reinterpretation of the statute that empowers the Bureau of Prisons in its custody of federal prisoners, 18 U.S.C. § 3621(b), and on the Sentencing Guidelines referred to therein. The Bureau of Prisons is constitutionally wrong.

Statute 18 U.S.C. §3621(b) pertains generally to the Bureau of Prison's discretion over "place of imprisonment" and provides in pertinent part:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise ... that the Bureau determines to be appropriate and suitable, considering -
>
> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence;
>
> (A) concerning the purpose for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to §994(a)(2) of title 28.

The Bureau of Prisons takes the position that the discretion §3621(b) affords the Bureau of Prisons in determining "place of imprisonment" does not include the discretion to transfer a prisoner to community confinement facilities - neither pursuant to a judicial

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recommendation at sentencing, nor at the end of a prisoner's term. Prison, it appears, necessarily means a very specific place - with barbed wires and absolute constraints on liberty- and nothing else.

No such limitation on Bureau of Prison's discretion is apparent on the face of §3621(b). The statute prescribes that the facility be "penal or correctional" and that it meet minimum habitability standards. Community confinement centers have historically been viewed to satisfy the statutory conditions. Iacaboni, 251 F. Supp. 2d at 1024-25. Simply stated, "[c]ommunity confinement constitutes one form of imprisonment, and a community confinement facility is a "penal or correctional facility". Id. at 1025.

The definition in §3621(a), states that "imprisonment" means ...

> A person who has been sentenced to a term of imprisonment ... shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behaviour pursuant to the provisions of section 3624.

The statute makes clear that it is not place, but custody, that defines imprisonment - a conceptual distinction that is consistent with long accepted views on this subject. See - Reno v. Koray, 132 L.Ed. 2d 46 (1995) (recognizing that time spent in community confinement subject to Bureau of Prisons custody entitles a prisoner to sentencing credit, while community confinement on pretrial release does not, because "[u]nlike defendants 'released' on bail, defendants who are detained or sentenced always remain subject to the control of the Bureau").

The term "imprisonment" does not require that all those in custody of the Bureau of Prisons must be confined in structures that resemble prisons. Section 3621 certainly does not impose such a limitation on the Bureau of Prison's discretion.

Furthermore, any argument that would attempt to rely on the

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Sentencing Guidelines to cabin the Bureau of Prison's discretion in place of confinement would be flawed and fatally defective, because when statutes conflict with other specific sections of the Sentencing Guidelines, the guidelines would have to yield. As Judge Ponser observed in Iacaboni, "statutes trump guidelines, not vice versa". Iacaboni, 251 F. Supp. 2d at 1024 (citing the Supreme Court's "emphatic" holding in United States v. LaBonte, 137 L.Ed.2d 1001 (1997), that notwithstanding the considerable authority given to the Sentencing Commission, "it must bow to the specific directives of Congress"); See also Pearson, 265 F. Supp. 2d. at 982 ("The Bureau of Prison's auhtority to place prisoners is set forth by Congress in 18 U.S.C. §3621(b), not by the Sentencing Commission in the guidelines".)

Second, the Sentencing Guidelines are binding only on the Courts; they have nothing to say about the Bureau of Prison's use of its agency discretion as custodian of federal prisoners. Iacaboni, 251 F. Supp. 2d at 1034. In fact, as Judge Ponser noted, §3621(b) gives an itemized list of factors the Bureau of Prisons is to consider in determining an appropriate place of confinement. One of these is "any statement by the court that imposed the sentence recommending a type of penal or correctional facility as appropriate", 18 U.S.C. §3621(b)(4)(B). At theend of the list of issues that the Bureau of Prisons is to consider are policy statements of the Sentencing Commission, Id. §3621(b)(5). Guidelines do not govern place of confinement - they never did and never will. They are about judicial sentencing. During the "imprisonment" component of his term, the offender, officially within the custody of the Bureau of Prisons, 18 U.S.C. 3621(a), is answerable to the Bureau of Prison for his conduct. The Bureau of Prisons can, in its discretion, withdraw him

from halfway house and transfer him to a higher-security facility.

Other statutes - not Guidelines - contemplate resort to Community Confinement as a form of imprisonment. Iacaboni, 251 F.Supp. 2d at 1029 (citing 18 U.S.C. §3622(b) (allowing imprisoned inmates to "participate in a training or educational program in the community"); §3622(c) (authorizing imprisoned inmates to "work at paid employment in the community while continuing in official detention at the penal or correctional facility").

Therefore, petitioner(s) submit that the "new policy" being followed by the Bureau of Prisons is violative of their Rights to Due Process under the United States Constitution, and in violation of Ex Post facto Laws because the adoption of such "new policy" is unlawful once such change stripped the Bureau of Prison's of their discretion under the statute(s).

LEGAL ARGUMENT

(E) CERTIFICATION OF CLASS ACTION SHOULD BE GRANTED BASED ON STANDING BEING ESTABLISHED

The ultimate determination of whether a class action is appropriate turns on the existence and extent of common questions of law and fact. A community of interest in the questions of law or fact affecting the members of the class is essential to the maintenance of a class action. A class action is maintainable if there are questions of law or fact common to the class. See - Gulf Oil Co. v. Bernard, 68 L.Ed 2d 693 (1981) ("Fed. R. Civ. P. 23 expresses a policy in favor of having litigation in which common interests, or common questions of law or fact, prevail disposed of, where feasible, in a single lawsuit).

The putative class representatives bear the burden of proving all criteria necessary for class certification, the party need not prove separate facts supporting each requirement; rather the party's burden is to establish those underlying facts sufficiently from which the Court can make necessary conclusions and a discretionary determination. Once the proponent of the class has made a prima facie showing that the prerequisites of the class action statute or rule are met, the burden of producing evidence shifts to the opponent, although the proponent retains the burden of persuasion.

Petitioner's now submit that they have standing for certification of the class, based on the following:

SUBJECT MATTER JURISDICTION

Standing:

Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases and controversies'. The constitutional power of federal courts cannot be defined, and indeed

Standing:

has no substance, without reference to the necessity to adjudicate the legal rights of litigants in actual controversies. Article III mandates that "the party who invokes the Court's authority [must] show that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant". Current decisions express the Article III requirements by demanding a 'personal stake' that will make the plaintiff an effective litigant; this quest is pursued by demanding an injury in fact that has been caused by the challenged conduct and that can be remedied by a judicial decree. See - Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d Section 3531. Citing - Vermont Agency of Natural Resources v. United States Ex. Rel. Stevens, 120 S.Ct. 1858, 1861-1862 (2000), holding that "[To] satisfy Article III's standing requirements, a plaintiff must show (1) he has suffered an injury in fact, that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged actions of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

In this instant matter, the petitioner(s) have alleged a "injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical". Each member and petitioner of the class is suffering immediate, irraparable, and threatened injury as a result of the challenged action of the sort that would make out a justiciable case, and each claim is common to the entire membership, and shared by all petitioner(s) and class members in equal degree.

Petitioner(s) harm is as follows:

(1) Violation of Ex Post Facto Clause - U.S.C.A. Art. 1, §9, cl.3 - Retroactive Application of Policy Change 18 U.S.C. §3624(c) & §3621 is a violation of Due Process under the Constitution

Standing:

(2) Violation of the Administrative Procedure Act's Notice and Comment Procedural Prerequisites Renders the "new" rule adoption Invalid and violates petitioner(s) rights to Due Process under the United States Constitution and 5 U.S.C.A. §553.

(3) Petitioner(s) and Class Members were subjected to improper and unlawful policy change in violation of their Fourteenth Amendment right to Due Process of law under the United States Constitution.

(4) Petitioner(s) are being held in confinement beyond their expected and anticipated six month release date, as outlined in the statute of 18 U.S.C. §3624(c) and §3621.

(5) Further incarceration by Petitioner(s) now eligible for Community Corrections extends such prisoner(s) terms past the "prior to the last Ten (10) percent" as outlined in 18 U.S.C. §3624(c).

(6) Petitioner(s) are suffering irreparable harm because each petitioner would have been placed in Community Corrections earlier than now scheduled under the 'reinterpreted policy, and application of the 'new' Bureau of Prisons policy delayed the petitioner(s) entry into Community Confinement in A Community Correction Center (Halfway House), which causes the extension of petitioner(s) release or "consideration" for release to be in violation of the procedural due process provided by the law and Constitution of the United States.

(7)Each petitioner has suffered harm directly by the exclusion from Community Correction Center of the time eligibility that is provided for by statute and policy statement.

(8) Each petitioner has shown 'individually and collectively' the existence of injury to themselves and the similarly situated class members as to rise to the level of sufficient immediacy and ripeness to warrant judicial intervention.

The rules of standing, whether as apsects of Article III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating

Standing:

that he is a proper party to invoke judicial resolution of the Court's remedial powers.

Petitioner(s), now state that apart from any statutorily created right, the asserted harm to themselves and the class members gives them standing to bring this matter as a class action. Each member is suffering directly, personally, and collectively as a result of the actions of the defendant(s). Which makes the harm to petitioner(s) and the class members sufficiently direct to satisfy the case or controversy requirement of Article III. Prudential considerations strongly counsel for granting petitioner(s) standing to prosecute this action. Petitioner(s) have met the threshold requirement.

NUMEROSITY HAS BEEN ESTABLISHED:

Because of the numerous amount of similar situated class members a class action is the proper procedure to facilitate litigation because the number of persons having an interest in this lawsuit is so great that it is impractical to join them all as parties. See - Fed. R. Civ. P. 23(b)(1)(A). In this matter, petitioner(s) have satisfied the numerosity requirement for certification of a class action, because petitioner(s) have adequately defined the class, and have established that it is so numerous that joinder of all members is impracticable. See - Fed. R. Civ. P. 23(b)(1)(B).

Petitioner(s) now ask that the Court exercise its practical judgment, given the facts of the particular case. There is no bright-line rule as to how many class members are required to satisfy the numerosity requirement for certification, and defining the class size is not a prerequisite to class certification. See - Philip Morris Inc. v. Angeletti, 752 A.2d 200 (2000) ("Plaintiffs need not state a number with specificity, to meet "numerosity" requirement for class action,

Numerosity Has Been Established:

as good faith estimate is ordinarily sufficient") There is no set number of class members which must be shown to warrant maintaining action as class action.

Petitioner(s) submit that the parties interested in the subject are so numerous that it would be impracticable to join them without long delays and inconveniences which would obstruct the purposes of justice. When such is the case, Courts of equity have long recognized the right of one or a few of such persons to sue for themselves and all others similarly situated, and thus represent the entire class or body of interested persons. See - Supreme Tribe of Ben Hur v. Cauble, 65 L.Ed. 673 (1921).

COMMONALITY HAS BEEN ESTABLISHED:

The commonality requirement for class certification is generally given a permissive application, and if there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied. The commonality requirement does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist. An issue of law or fact should be deemed "common" for puposes of the commonality requirement, only to the extent its resolution will advance the litigation of the entire case.

Petitioner(s) submit that class action is proper because questions of law and fact are common to all members of the class and predominate over any questions that would affect individual members, and that the issue's and legal arguments presented by petitioner(s) are so tightly interwoven in the dispute that they directly affect its resolution. Petitioner(s) now submit that the existence of common

COMMONALITY HAS BEEN ESTABLISHED:

questions of law or fact constitutes a sufficient community of interest to sustain a class action, because the common questions are sufficiently important to permit adjudication in a class action, rather than in a multiplicity of separate suits. In this instant matter, it is not necessary for each member of the class to establish his right to recover against the defendant(s) on facts peculiar to each member's own case, since there are important issues to be determined on behalf of the entire group, which all relate to the same conduct and same relief being requested to cure such unlawful conduct. Petitioner(s) ask that the Court determine that commonality has been established because a "sufficient community of interest exists" between the petitioner(s) and the class.

TYPICALITY REQUIREMENT HAS BEEN MET:

Petitioner(s) submit that they have met the prerequisites to maintain a class action because the claims and/or defenses of the representative parties are typical of the claims or defenses of the class. The typicality requirement focuses on the interests of the class representatives. It is now submitted that petitioner(s) have met the essence of the typicality requirement by showing that the relationship between the injury to the class representatives and the conduct affecting the entire class of plaintiffs is sufficient for the Court to properly attribute a collective nature to the challenged conduct. Petitioner(s) claims satisfy the typicality prerequisites because it arises from the same event, practice, or course of conduct from which the claims of other class members arise, and are based on the same legal theory. Furthermore, the typicality requirement is met because the same unlawful conduct was directed at and affected both

TYPICALITY REQUIREMENT HAS BEEN MET:

the class members and the plaintiff. A careful review by the Court of the defendant(s) conduct should be sufficient to establish a prima facie determination by the Court that the claims or defenses of the representative parties are typical of the claims or defenses of the class.

Petitioner(s) now state that they have demonstrated that the members of the class have the same or similar grievances as themselves (that is, named representatives have established the bulk of the elements of each class member's claim when they proved and presented their claim to the Court). Petitioner(s) now ask that the Court rule that the typicality requirement has been met in this matter, because all the members of the purported class desire the same outcome of the action that their representatives desire.

Petitioner(s) requests that the Court certify this matter as a class action because the requirements relating to the commencement of a class action has been satisfied under the Model Class Action Act. See - M.C.A.A. §1; and, a class action should be permitted for the fair and efficient adjudication of the controversy - M.C.A.A. §3(a); an lastly, because the representative parties fairly and adequately will protect the interest of the class. See - M.C.A.A. §2(b).

For the above and all the herein reasons mentioned, the now named petitioner(s) request that this matter be granted class action certification and status.

LEGAL ARGUMENT

(F) PRISON LITIGATION REFORM ACT'S (PLRA) EXHAUSTION REQUIREMENT DOES NOT APPLY TO PRISONER'S HABEAS PETITION WHICH CHALLENGES BUREAU OF PRISONS POLICY, CONCERNING MANNER, LOCATION, OR CONDITIONS OF SENTENCES EXECUTION, NOT CONDITIONS OF CONFINEMENT.

Petitioner(s) submit that they are not required statutorily under the Prison Litigation Reform Act (PLRA) to exhaust their Administrative remedies before filing Habeas Corpus petition under 28 U.S.C. § 2241. See Grier v. Hood, C.A. 9 (OR.) 2002, 46 Fed. Appx. 433, 2002 WL 1997873; Following, Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996); Santana v. United States, 98 F.3d 752 (3rd Cir. 1996); United States v. Coles, 101 F.3d 1076 (5th. Cir. 1996). The term "civil action" with respect to prison conditions means any civil proceedings arising under Federal law with respect to the conditions of confinement or the effects of actions by Government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. See - 18 U.S.C. § 3626(g)(2).

Petitioner(s) do not challenge prison conditions, but rather they challenge the BOP's rule revision that deprives it of legal discretion to designate certain offenders to community confinement facilities when performing its statutory duty to execute criminal sentences. It is well established that challenges to the "manner, location, or conditions of a sentence's execution" are proper subjects of a habeas corpus action under § 2241. See - Gonzalez v. United States, 150 F. Supp. 2d 236, 240 (D. Mass. 2001)(citing Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000). And as such, the statutory PLRA exhaustion requirement does not apply. See - Davis v. Fechtel, 150 F.3d 486, 490 (5th Cir. 1998) ("The PLRA thus does not apply to section 2241 proceedings"); West, 2003 WL 1119990, at *2 ("[T]he

Cont ...

explicit exhaustion requirements which are contained in ... the ... AEDPA ... and the ... PLRA do not apply to habeas petitions filed under 28 U.S.C. § 2241.").

Petitioner(s) now submit that notwithstanding the fact that the PLRA does not apply to Habeas Corpus petitions, pursuit of full administrative remedies in this case would be futile, because the BOP has announced a clear and inflexible policy. See - Iacaboni, 251 F. Supp. 2d at 1017 n. 1.

Petitioner(s) have for the sake of giving the defendant(s) the opportunity to correct their mistake in law, filed administrative remedies on the Institutional level to the Unit Team that originally made the erroneous classification decision by way of BP-8, which was denied, and petitioner(s) then appealed to the Warden - Michael A. Zenk by way of BP-9 which was also denied on _____, 2004.[1.]

Petitioner(s) have done more than was required of them by law in an attempt to remedy this matter on an Institutional level, and the defendant(s) have maintained their position that their actions are in accordance with the law as they understand it from the Legal Counsel at the Department of Justice - Office of Legal Counsel to the United States Deputy Attorney General. Petitioner(s) now move for this matter to be heard because exhaustion is not required under §2241.

1./ Petitioner(s) Appendix contains a complete set of Inmate Remedy Forms which were filed with the Unit Team And Warden at Metropolitan Detention Center in Brooklyn, New York.

CONCLUSIONS

A change in law has retroactive effect when it "attaches new legal consequence to events completed before its enactment". See - Landgraf v. USI Film Prods., 128 L.Ed 2d 229 (1994). The retroactive application of laws , under certain (but not all) circumstances , can work harm of constitutional significance. Specifically, such a practice can offend the principles of due process and the Constitution's proscription of ex post facto laws. Id. at 266. In this matter the Bureau of Prison's policy does both.

It is beyond dispute that the Bureau of Prison's recasting of §3621(b), which strips it of its discretion in determining an inmate's place of confinement, has the binding effect of law. The Deputy Attorney General's opinion to the Bureau of Prison trumps non-binding judicial recommendations, and therefore, the policy change is law because it binds the hands of the Bureau of Prison. The United State Supreme Court in Weaver v. Graham, 67 L.Ed 2d 17 (1981), held that "a law need not impair a 'vested right' to violate the ex post facto prohibition." Ashenazi, 246 F. Supp. 2d at 6. Rather the Weaver Court observed:

> Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Taking Weaver's cue, courts have found that "administrative rules that purport to correct or clarify a misapplied existing law" can violate the Ex Post Facto Clause. See - Knuck v. Wainwright, 759 F.2d 856, 859 (11th. Cir. 1985) (finding that the Department of Corrections policy change in "gain time" calculations, though interpretive, violated the Ex Post Facto Clause because it conflicted with 10 years of established practice and regulations".).

Cont ...

CONCLUSION

The Fifth Amendment forbids the federal government from depriving a person of his right to life, liberty, or property without due process. United States Constitutional Amendment V. Among the numerous safeguards that due process principles provide is a protection against certain forms of retroactively applied laws. Due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation" Landgraf, 511 U.S. at 266.

Petitioner(s) now submit that the Court should find that the petitioner(s) have demonstrated a clear likilihood of success on the merits. Improperly subjecting offenders to prison rather than to community confinement when they are due to be considered for such inflicts irreparable harm on them, their families, and their communities. Recognition of the Bureau of Prison's discretion to utilize community confinement inherent in the Bureau of Prison's pre-December 2002 policy poses no special burden on the government. And maintaining a full menu of appropriate punishment options is in the public interest. See - Utility Contracters Ass'n of New England, Inc. v.City of Worcester, 236 F. Supp. 2d 113, 117 (D. Mass. 2002) (laying out the above prerequisites for injunction).

FOR RELIEF WE PRAY